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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

—v.—

MARSHA B. KOKINDA and KEVIN E. PEARL,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MARYLAND IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*•

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 275,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Maryland is one of its state affiliates.

Throughout its 70 year history, the ACLU has been particularly concerned with any abridgement of the freedoms guaranteed by the First Amendment. The ACLU has, therefore, appeared before this Court in numerous cases involving the First Amendment, both as direct counsel and as *amicus curiae*. Because this case raises an important First Amendment issue of organizational concern to the ACLU, we respectfully submit this brief as *amicus curiae* for the Court's consideration.

STATEMENT OF THE CASE

On August 6, 1986, Marsha Kokinda and Kevin Pearl set up a table on the sidewalk in front of the Bowie, Maryland post office. They distributed literature and solicited contributions to their political organization, the National Democratic Policy Committee. The sidewalk in question is about seven feet wide and runs from a parking lot to the door of the building. Another sidewalk separates the parking lot from the street. After refusing to leave, Kokinda and Pearl were arrested.[1]

They were convicted of violating 39 C.F.R. §232.1(h), which provides that:

•Letters of consent to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 36.2.

[1] The facts are set forth in the Court of Appeals opinion, *United States v. Kokinda*, 866 F.2d 699, 700-01 (4th Cir. 1989).

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises is prohibited.

The regulation does not prohibit the distribution of leaflets and other expressive activities.[2]

On appeal, the Fourth Circuit reversed, holding that the sidewalk was a traditional public forum and that the postal regulation was too draconian to pass muster as a time, place, or manner regulation.[3] The United States then petitioned for *certiorari*, contending that the sidewalk was a nonpublic forum, and that the post office ban was therefore valid. This Court granted the petition on October 2, 1989.

SUMMARY OF ARGUMENT

Restrictions on speech on government property are governed by *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). *Perry* divides government property into three classes:

> (a) traditional public forums like streets, parks, and sidewalks, where the government's regulatory power is quite restricted,
>
> (b) limited public forums voluntarily created by the government, which are essentially treated like traditional forums, and

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[2] *See United States v. Bjerke*, 796 F.2d 643, 646 (3d Cir. 1986).

[3] The discussion of these issues is found in 866 F.2d at 702-06. Judge Widener dissented, *id.* at 706.

> (c) nonpublic forums, where restrictions on speech receive relatively cursory review.

We believe that the Court of Appeals reached the correct result even under *Perry*. More fundamentally, however, we believe the *Perry* approach has outlived its usefulness.

Perry has two basic flaws. First, the divisions between the categories have proved elusive. For example, if *some* charitable solicitation is allowed in a given place, that location could be considered a limited forum open for all charitable solicitation. Alternatively, the forum could be considered nonpublic, with solicitation allowed only on sufferance. *Perry* and later cases have failed to provide any guidance on drawing these crucial lines. Second, *Perry* is mechanistic. It focuses on geography rather than on substantive issues. Often, the results may turn on geographic accidents (like the placement of a parking lot in the instant case), which may determine how a forum is classified.

Because of these inadequacies, *Perry* should be replaced by a nexus test, focusing on the connection between a government regulation and the special needs of a particular facility. For example, a regulation of speech on school property would have to be justified by the need to maintain an effective educational process. Such an analysis, we submit, is no more than common sense.

The postal office regulation at issue in this case cannot survive nexus analysis or any other serious scrutiny. There is no showing that solicitation poses any different threat to post office sidewalks than it does to other sidewalks. Whatever arguments can be made for this ban would apply equally to a complete ban on *all* sidewalk solicitation. No one would claim that such a complete ban would be constitutional, and the post office ban is equally unconstitutional.

ARGUMENT

I. THE *PERRY* DOCTRINE IS A RECENT INNOVATION THAT HAS ALREADY BEEN ERODED BY LATER CASES

Public forum doctrine has been sharply criticized by members of this Court,[4] other federal judges,[5] and numerous legal scholars.[6] One commentator recently summarized the current state of public forum law as follows:

> The Court has yet to articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories, much less for the myriad of formal rules governing the regulation of speech within these categories. These rules have proliferated to such an extent as to render the doctrine virtually impermeable to common sense. The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property. It has received nearly universal condemnation from commentators and is in such a state of disrepair as to require a fundamental reappraisal of its origins and purposes.[7]

The instant case presents a useful opportunity to begin that reappraisal.

Current public forum doctrine is a relatively recent innovation. Prior to 1970, the phrase "public forum" had appeared in only two opinions of this Court, and it was used only seventeen times in the 1970s.[8] Thus, public forum doctrine is essentially a phenomenon of the 1980s.

Since public forum doctrine is often invoked today to justify restrictions on speech, it is ironic that the doctrine was originally intended to increase the constitutional protection for free expression.[9] In a famous dictum in *Hague v. CIO*, 307 U.S. 496, 515-16 (1939), Justice Roberts spoke of the special historic role of streets and parks as forums for public debate. His purpose, however, was not to indicate that freedom of speech was less important at other locations. Rather, he referred to the special status of streets and parks only to rebut the notion -- then arguable but now clearly defunct

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[4] *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985)(Blackmun, J., joined by Brennan, J., dissenting); *id.* at 833 (Stevens, J.)(expressing skepticism about the public forum doctrine); *Greer v. Spock*, 424 U.S. 828, 859-60 (1976)(Brennan, J., dissenting).

[5] *See Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 377 & n.7 (5th Cir. 1989)(criticizing "formulaic application of the public forum doctrine" and citing commentators' warnings that "rigid application of public forum analysis threatens to obscure important first amendment issues").

[6] *See* L. Tribe, American Constitutional Law 992-93 (2d ed. 1988); Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L.Rev. 1713, 1715 (1987); Stone, *Content-Neutral Restrictions*, 54 U. Chi. L.Rev. 46, 93-94 (1987); Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L.Rev. 1, 46-49 (1986); Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 Geo. Wash. L.Rev. 109 (1986); Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L.Rev. 1219, 1220-24 (1984).

[7] Post, *supra* n.6, at 1715-16 (footnote omitted).

[8] *See* Farber & Nowak, *supra* n.6, at 1221-22.

[9] Justice Marshall noted this inconsistency between the origins of the doctrine and its current use in *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 147-48 (1981)(Marshall, J., dissenting).

-- that the government has unrestricted authority as a landowner to control speech on its own property.[10]

Speech in public places once again became an important issue in the 1960s and early 1970s. In a series of cases, the Court attempted to define the contours of government regulation of speech on public property.[11] Although these cases remain useful sources of guidance, it was only in the early 1980s that a public forum test crystallized.

The current test governing speech restrictions on public property was set forth in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37. *Perry* divides government property into three categories, each with its own detailed set of First Amendment rules. In the "traditional" public forum, the government "may not prohibit all communicative activity," but it can enforce content exclusions based on compelling state interests. *Perry* also recognizes two other classes of forums. In the "limited" public forum, which the state has voluntarily opened to use for public communication, the same rules apply as in the traditional public forum, except that the government reserves the power to close the forum completely. Finally, in the residual category (the "nonpublic" forum), the state may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 45-46.

Despite frequent invocations of the *Perry* test, it has been substantially undermined by more recent cases. In

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[10] *See* Post, *supra* n.6, at 1721-24. Professor Kalven emphasized this aspect of the Roberts dictum in his classic article, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup.Ct.Rev. 1.

[11] *See e.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965).

particular, the second category (the limited public forum) has proved analytically intractable. According to *Perry*, the defining characteristic of the traditional forum is that "[i]n these quintessential public forums, the government may not prohibit all communicative activity." But in *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Court struck down as fatally overbroad a ban on all expressive activity at an airport. The ban created what the Court called "a virtual 'First Amendment Free Zone,'" and the Court thought it obvious "that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." 482 U.S. at 574-75. Notably, as Justice White's concurring opinion points out, the Court found it unnecessary to decide whether the terminal was a traditional public forum. Thus, the fundamental distinction between traditional and limited forums seems to have dissolved. What was supposed to be the defining trait of the traditional forum (that it can't be closed to all expression) turns out to apply to the other categories as well.

Just as the line between limited and traditional forums has dissolved, so has that between limited and nonpublic forums.[12] Under *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985), the defining feature of a limited forum is the government's intent. This standard risks obliterating the "limited forum" category altogether,[13] for it requires the court to find that the government intended to open a forum for people like a particular plaintiff -- a difficult

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[12] *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 818-20 (1985)(Blackmun, J., dissenting).

[13] *See* Laycock, *supra* n.6, at 47 ("It makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will").

finding to make since the government has excluded that speaker herself. For this reason, one scholar has called *Cornelius* the "*coup de grace*" for the limited public forum.[14] If the limited forum does retain any vitality after *Cornelius*, the definition of this category remains utterly opaque.

The case at hand further illustrates how the public forum boundaries have become completely obscure. On the one hand, the case presumptively falls into the category of a traditional public forum since it involves a sidewalk.[15] On the other hand, since the government regulations themselves allow a broad range of expressive activity, the "limited forum" label could well apply;[16] but since not *all* forms of expression have been allowed, some courts of appeals have thought it was a "nonpublic" forum instead.[17] The disagreement about how to classify a perfectly simple fact pattern exemplifies the inadequacy of public forum doctrine.

A mere six years after *Perry*, its analytical scheme lies in tatters. The *Perry* classification has been discarded for most purposes. Content neutral regulations are subject to the same test in all forums. Viewpoint regulation is suspect, whether the forum is public or

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[14] Post, *supra* n.6, at 1756. Professor Post adds that "*Cornelius* shrinks the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum." *Id.* at 1757.

[15] *See Frisby v. Schultz*, 487 U.S. ___, 108 S.Ct. 2495, 2500 (1988)(rejecting particularized inquiry into whether particular types of streets or sidewalks have been traditionally used as public forums).

[16] *See National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717, 723 (7th Cir. 1984).

[17] *See e.g., United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986); *United States v. Bjerke*, 796 F.2d 643, 648 (3d Cir. 1986).

nonpublic. Today, *Perry* remains relevant in only one context. Exclusions based on content (but not viewpoint) are subject to a reasonableness test in a nonpublic forum, but to stricter scrutiny in a traditional or limited forum.[18] However, even this distinction has little utility since *Cornelius* has virtually erased the distinction between the limited and nonpublic forum. In sum, although *Perry* is a relatively recent precedent, its vitality has already been sapped by later developments. The time is ripe, therefore, to reconsider the *Perry* test.

II. THE *PERRY* DOCTRINE HAS BEEN APPLIED IN A MECHANISTIC FASHION THAT IMPEDES ANY SERIOUS BALANCING OF INTERESTS

Public forum doctrine has needlessly confused the development of First Amendment principles, even in cases where the doctrine has no real relevance. As Professor Tribe observes, "many recent cases illustrate the blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification."[19]

For example, in *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), the issue was whether nonprofit organizations could be prosecuted for placing pamphlets in the letter boxes of private homes. A letter box might be regarded as a public forum because it is a traditional means for the public communication of stamped letters, or as a nonpublic forum because the government has reserved it for the delivery of stamped mail. The majority's ultimate resolution of the case was to say that mailboxes could be reserved for stamped letters because they were not

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[18] *See* Post, *supra* n.6, at 1760-62.

[19] L. Tribe, *supra* n.6, at 987.

public forums; the reason they weren't public forums was that the government had reserved them for stamped letters. The outcome may have been correct, but the analysis is an exercise in circularity, which is why Justice White's concurrence described the public forum analysis as "bootless."[20]

In other cases, public forum analysis has led to a series of seemingly inexplicable distinctions. Perhaps there is a defensible distinction between leafletting on the steps of the Supreme Court and on the adjoining sidewalk,[21] or between an educational institution's restrictions on access to unused classrooms and to faculty mailboxes,[22] but the distinctions are more subtle than public forum analysis would indicate.

Once again, the case at hand illustrates the analytical inadequacy of the public forum doctrine. The parties phrase the key issue as whether post office sidewalks are public forums. Respondents argue that all sidewalks are presumptively public forums under this Court's previous decisions.[23] The Solicitor General points instead to the physical separation between the post office sidewalk and the municipal sidewalk. He also relies on the existence of the soliciting ban itself as evidence that the forum has not been opened to such activity.[24] In *amici*'s view, respondents have the better of that debate. But the debate itself shows just how *Perry* reduces constitutional

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[20] *Id.* at 142 (White, J., concurring in the judgment).

[21] A distinction drawn in *United States v. Grace*, 461 U.S. 171, 178-84 (1983).

[22] Compare *Widmar v. Vincent*, 454 U.S. 263 (1981), with *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37.

[23] *See* Op.Cert. at 4-11.

[24] *See* Cert.Pet. at 7-12.

analysis to a question of geography, so that the placement of a parking lot becomes a matter of potentially grave constitutional import.[25] Something is awry when the great teachings of the First Amendment are reduced to squabbles over landscape architecture.

Our objection to public forum analysis is not that it invariably yields wrong results (although it may sometimes do so), but that it distracts attention from the values at stake in a given case. Too often, the effect of public forum analysis is that, "[r]ather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing." *Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting).[26]

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[25] Judge Higginbotham has remarked that he is "unable to fathom why the government's power to restrict speech-related activities on a public sidewalk depends on whether the sidewalk is separated from the street by a parking area." *United States v. Bjerke*, 796 F.2d 643, 654(3d Cir. 1986)(dissenting opinion). Yet, such accidents of location have been called "pivotal" by other judges in upholding the post office ban on solicitation. *See Monterey County Democratic Central Committee v. United States Postal Service*, 812 F.2d 1194, 1197 (9th Cir. 1987).

[26] Public forum doctrine may also hinder lower court judges from focusing on those values or from making sense of Supreme Court precedent. Classifying a medium of communication as a public forum may cause legitimate governmental interests to be thoughtlessly brushed aside; classifying it as something other than a public forum may lead courts to ignore the incompatibility of the challenged regulations with First Amendment values.

III. *PERRY* SHOULD BE REPLACED WITH A NEXUS ANALYSIS, FOCUSING ON THE RELATIONSHIP BETWEEN A SPEECH RESTRICTION AND THE NATURE OF THE GOVERNMENTAL FACILITY

As *Perry* itself recognizes, viewpoint based restrictions on speech are suspect even in the nonpublic forum, as of course they are elsewhere. With respect to content neutral regulations, the nature of a government facility may be factually relevant, but the constitutional test does not vary with the nature of the facility. Thus, the distinctive legal standard created by *Perry* is only relevant to non-viewpoint but content related restrictions on speech. For example, under *Perry*, a restriction based on subject matter is normally permissible in a nonpublic forum but is highly suspect in a traditional forum. Similarly, the government may restrict a nonpublic forum to certain speakers because of the special relationship between their speech and the function of the forum.

The government clearly may have a special interest in controlling speech to ensure the effective functioning of a particular government facility. The flaw in *Perry* is that, having recognized this fact, the Court then adopted a test based more on geography than on a serious examination of the government's special regulatory interest.

In *amici*'s view, there is a much simpler, far more straightforward approach. If the government wishes to claim a special power to restrict speech in a particular forum, the government should be able to demonstrate a nexus between the regulation and the distinctive nature of the forum that is both real and substantial. A special restriction on picketing near schools must be justified by the needs of schools; a ban on faculty mailbox use must have something to do with the mail system; a ban on post office solicitation must have some connection with the postal system. Without such a nexus, it is nothing

more than a coincidence that a particular regulation applies only to a particular government facility.[27]

Although a nexus test would clarify First Amendment standards, it would not mean a radical break with the results in prior cases. In most public forum cases, the Court has not been content with an application of *Perry*, but has also made some attempt to consider whether a restriction on speech was linked to a particular government interest of significance. For example, the Court has decided a series of public school cases. The "forums" involved have ranged from the sidewalk outside the school[28] to a school assembly.[29] Despite the diversity of these settings, including both traditional forums and nonpublic forums, the decisive factor in the cases has always been whether the speech in question interfered with the educational mission of the public schools.[30]

Like the *Perry* approach, the nexus test also provides special leeway for speech on streets, sidewalks, and parks. It is difficult indeed to imagine how the identity of a speaker, or the subject matter of the speech, would have any connection at all with street maintenance,

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[27] For example, the government contends in the present case that sidewalk solicitation blocks access to post office buildings. But there is no reason to believe that post office sidewalks are particularly narrow or otherwise more likely to be blocked than any other sidewalks. There is also no reason to believe that access to post offices is more urgent than access to many other buildings (a factor that might support restrictions on the sidewalk in front of a hospital emergency room, for example). Thus, the fact that the sidewalk is owned by the federal government rather than the city, or that it leads to a post office rather than a grocery store, simply has no relevance.

[28] *See Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

[29] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

[30] *See* Farber & Nowak, *supra* n.6, at 1245-53.

traffic flow, or any other governmental interest relating to streets. Thus, under the nexus approach, strict content neutrality remains the rule in these settings.

Although the nexus test would often lead to the same results as *Perry*, it would have several advantages. First, the nexus test is much simpler. It replaces a three part scheme with a unified test. Second, rather than requiring courts to grapple with a recondite classification scheme, it directs their attention to the practical reasons for a government regulation. The result should be a clearer and more consistent body of precedent. Third, the nexus test gives both speakers and government authority a much more understandable guideline. The difference between a limited public forum and nonpublic forum is not easy to discern even for constitutional lawyers, let alone to explain to an administrator or a protestor. A school's legitimate interest in preventing interference with its educational mission is something that everyone can understand.

One of the subtle harms caused by the *Perry* approach is that it actually discourages administrators from adopting clear regulations about access to governmental forums. Having adopted a rule that establishes a clear right to access, the government may then be faced with a claim that it has established a limited public forum. If it decides the access question on an *ad hoc* basis, it avoids this risk.[31] In contrast, the nexus test

[31] *Perry* itself illustrates this situation. Although the school board had granted access to the faculty mailboxes on various occasions, the Court held that the mailboxes remained a private forum because "[p]ermission to use the system to communicate with teachers must be secured from the individual building principal . . . . This type of selective access does not transform government property into a public forum." 460 U.S. at 47. Indeed, the record was also unclear about just what communications from the incumbent union itself would be allowed. *See id.* at 13. The *Perry* Court found itself in the unenviable (continued...)

encourages the implementation of clear regulations. Without a clear statement of what speech is allowed or forbidden, the government would be hard pressed to show that a restriction is tied to any specific governmental interest.

Perry also demonstrates how the nexus test would strengthen protections for freedom of speech. The *Perry* opinion devotes two sentences of text to discussing the school district's only justification for the mailbox rule, which was that it would promote "labor peace." 460 U.S. at 52. A less formalistic analysis might have led the Court to inquire into the substantiality of this justification. If the First Amendment means anything, it should at least mean that courts will take a serious look at the justifications for restrictions on speech, rather than casually accepting any justification that is not wholly implausible. Unfortunately, the *Perry* test encourages just such offhand acceptance of restrictions on speech.

This does not mean, of course, that the nexus test would require the government to throw open every bulletin board, classroom, and office building to the general public. What it does require, however -- and what this Court *should* require of the government -- is that content related restrictions on speech in a particular forum actually be connected with genuine government interests relating to that forum.

[31] (...continued)
position of reviewing a restriction on access as applied to other groups, without any clear understanding of just what groups were excluded or exactly how much access was allowed. *Perry* gives school administrators little incentive to provide clearer guidance in the future; on the contrary, doing so could only create possible legal difficulties for them. Vague rules, of course, not only chill speech, but constitute an open invitation to viewpoint discrimination in applying them.

IV. THE POST OFFICE'S BAN ON SOLICITING CANNOT SURVIVE NEXUS ANALYSIS OR ANY OTHER FORM OF SERIOUS FIRST AMENDMENT SCRUTINY

The post office ban on solicitation can be viewed as a restriction on the subject matter of speech -- the topic being the desirability of a charitable donation. This ban has no ascertainable relationship with any peculiar feature of the post office. There is no claim that postal clients are more easily distracted than other members of the public, that postal sidewalks are narrower, or that any other unusual feature distinguishes post office sidewalks from any other sidewalks. Whatever argument can be made for banning solicitation in front of post offices would apply equally to solicitation in front of any other building. The regulation therefore fails the nexus test, because there is no connection at all between it and the special needs of a particular governmental operation.

The regulation would fare no better if it were considered content neutral. Even a content neutral regulation must serve a reasonable government purpose, and there is no showing that such a purpose is served here. The government freely allows leafletting and other expressive activities, as well as some forms of solicitation. There has simply been no showing that sidewalk solicitation poses a significantly greater likelihood of impeding postal operations. While the government is not required to choose the least restrictive regulation, *see Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746 (1989), a ban on blocking the sidewalk is such an obvious alternative that the solicitation rule can hardly be considered reasonable.

The fact that this indefensible ban has been upheld by some courts of appeals is largely a tribute to the obscuring power of the *Perry* test. By calling the post office sidewalk a private forum, these courts have avoided any serious examination of the government and

speech interests at stake. But whatever might be the proper extent of access to school mailboxes or federal fund drives, the post office sidewalk is a far cry from those situations. The sidewalk is not only open to the general public, but it is also open to all manner of expressive activities except solicitation. Only by discarding common sense in favor of formalism could the solicitation ban stand. Even under *Perry*, it was properly struck down by the court below.

CONCLUSION

The *Perry* test should be replaced with a test focusing on the nexus between a governmental restriction on speech and the special attributes of a particular forum. The post office ban on sidewalk solicitation cannot survive that test, or any other serious First Amendment scrutiny, including *Perry*. Consequently, the judgment of the Court of Appeals for the Fourth Circuit, reversing respondents' convictions for violation of the regulation, should be affirmed.

Respectfully submitted,

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